No. 10-492

In The
Supreme Court of the United States

YOUA VANG LEE, Trustee for the Heirs and Next-of-Kin of Fong Lee, Decedent,

Petitioner,

v.

OFFICER JASON ANDERSEN and THE CITY OF MINNEAPOLIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Eighth Circuit Court of Appeals erred when it ruled that evidence of Decedent Fong Lee's gang affiliation should have been excluded under Fed. R. Civ. P. 403, but that, in light of all the evidence presented during the trial, and Respondent's limited use of gang affiliation, admission of the evidence did not affect Petitioner's substantial rights or have more than a slight influence on the verdict.

II. Whether the District Court erred by placing a factual predicate question regarding qualified immunity on the special verdict form, and whether that error was mooted by the fact that the jury never answered the qualified immunity factual predicate question because it found in Respondent's favor on general liability.

III. Whether the District Court, applying Fed. R. Civ. P. 702, properly prohibited Petitioner's purported expert from testifying as to what he saw in seven vidéo still images, because the expert stated that he did not employ any specialized knowledge or skill in determining what he saw in the images, and the jury was equally capable of making its own determination.

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OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit issued its opinion on August 12, 2010. *Youa Vang Lee v. Andersen*, 616 F.3d 803 (8th Cir. August 12, 2010).[1] The opinion is reproduced in Petitioner's Appendix starting at App. 1. The United States District Court for the District of Minnesota denied Petitioner's Motion for Amendment (JNOV) and/or New Trial on June 26, 2009. The District Court's Memorandum and Order is reproduced in Petitioner's Appendix starting at App. 24.

STATEMENT OF JURISDICTION

Petitioner incorrectly states that this Court has jurisdiction to review the Judgment of the Eighth Circuit Court of Appeals, entered on August 12, 2010, pursuant to 28 U.S.C. § 1245(1). *See* Petition at 1. This Court has jurisdiction to review the Eighth Circuit's judgment pursuant to 28 U.S.C. § 1254(1).

[1] Petitioner incorrectly cites the Eighth Circuit's opinion in this matter as the unreported "2010 WL 3168627." The correct citation to the opinion of the Eighth Circuit Court of Appeals is stated above.

STATEMENT OF THE CASE

I. The Petition misstates the facts adduced at trial

Pursuant to Sup. Ct. R. 15(2), Respondent must correct the misstatements of fact alleged in the Petition. Contrary to Petitioner's assertions, the evidence clearly supported the jury's verdict. Petitioner presents a skewed view of the facts that is not supported by competent evidence. The jury rejected similar arguments after hearing almost six days of testimony.

a. Corrections to Petitioner's facts

On pages 2-3 of the Petition, Petitioner implies that the officers improperly approached the group of bicyclists, including Decedent Fong Lee. In fact, Officer Andersen, and his partner for the evening, Trooper Benz, had their squad car windows down and tried to talk to the bicyclists to make citizen contact, an accepted police practice. Trial Transcript p. 389. Nhia Lor, one of the bicyclists, confirmed that one of the officers even said "[h]ey guys" as the squad car caught up with the group. Transcript p. 528. Lor testified that he saw Lee, who was riding ahead of him, look back at the squad car. Transcript p. 534.

The evidence also established that the officers saw Lee with a handgun before the shooting. Lee's fellow bicycle riders, and the officers agreed that Fong Lee and Tou Xiong were ahead of the squad car and at one point came together. Transcript pp. 346; 391-392; 477; 534-535. The Petition omits the

important fact that both Officer Andersen and Trooper Benz saw Lee and another bicyclist exchange an item when they came together. Transcript pp. 346; 391-92. Benz was initially unable to determine what the young men exchanged, but Andersen saw that it was a gun. Transcript pp. 346; 391-392. Lor heard an officer say "He's got a gun." Transcript p. 535. At that point, Lor testified that "boom, the police just took the car right off the curb and started chasing Phong [sic Fong]." *Id.* Andersen confirmed that he yelled "He's got a gun." Transcript pp. 346.

Petitioner's statement, "[w]ithout provocation, Andersen hit Fong Lee with his police car, knocking Fong Lee off his bike," is not supported by the evidence. Petition at 3. At trial, Respondent clearly established that Lee dropped his bicycle and started running away from the squad car. The squad car never got closer than ten feet from Lee while he was on his bicycle. Petitioner's first witness at trial, Vajying Vou, testified on direct examination that he saw the squad car strike Lee on his bicycle, knocking Lee and his bicycle to the ground. Transcript pp. 57-58. However, after viewing the security camera footage depicting the squad car and Lee on a bicycle, Vou agreed that Lee dropped his bicycle and ran. Transcript pp. 63-65; Trial Exhibit 14. Vou agreed that the squad car never got closer than ten feet from Lee. *Id.* Both Andersen and Benz testified that after receiving an item from his fellow rider, Lee rode a

while, dropped his bicycle voluntarily, and ran. Transcript pp. 346; 392-393. Phong Xiong was shown the surveillance video and admitted that he was wrong when he earlier testified that the squad car hit Lee's bicycle. Transcript p. 502. It is clear that the squad car never made contact with or hit Lee or his bicycle. Transcript pp. 60-65; 500-502; Trial Exhibit 14; App. 27, 36.

Contrary to Petitioner's claims, Respondent presented substantial evidence indicating that Lee possessed a gun in the moments prior to his death. Once he started the foot-chase, Andersen broadcast on his police radio: "442 chasing one with a gun." Transcript p. 351; Trial Exhibit 2. As the foot chase began, Benz saw that the object Lee was carrying was a gun, shouting "gun" and "police" as Lee ran away. Transcript p. 393. When Andersen chased Lee around the school, Lee turned towards Andersen with the gun clearly visible in his hand. Transcript p. 354. At this point, Andersen felt that his life was threatened and fired one shot. Transcript p. 354. The assertion on page 4 of the Petition that Andersen first fired a volley of three shots is incorrect. Andersen's first round hit the dirt, not striking Lee. Transcript p. 354.

The chase continued around the school into a dead end area where Lee again turned towards Andersen with a gun in his hand. Transcript pp. 356-357. Andersen felt his life was in danger and fired three shots, knocking Lee to the ground. Transcript pp. 357-358. Lee, still with the gun in his hand, tried to get up and Andersen fired five more shots at Lee

until Lee fell backwards and the gun flew out of Lee's hand. Transcript pp. 358-359.

Petitioner's description of Lee's injuries inappropriately implies that Lee was not a threat when Andersen shot him. Petition, p. 4. The injuries described in the autopsy report closely correlate to Andersen's testimony about Lee's actions. The District Court observed that "[t]he wounds are entirely consistent with Officer Andersen's story that he shot at Fong Lee while he was turning toward him. Other wounds are consistent with Officer Andersen's story that he shot at Fong Lee while he was on the ground." App. 37.

b. The crime scene evidence is consistent with Andersen's testimony.

Petitioner's assertion that the crime scene evidence is inconsistent with Andersen's testimony ignores the evidence that was presented at trial. *See* Petition at 4. First, Petitioner's statement that the school "video does not show that Fong Lee was holding a weapon," is contrary to the evidence. Petition at 4. The school surveillance video of the beginning of the chase showed that Lee had a gun as he ran from the officers. Transcript pp. 936-937 (describing Trial Exhibit 14). The District Court agreed, stating that "[a]nother segment of the video that Plaintiff's counsel apparently had not looked at did show that Fong Lee had a gun." App. 28. Later, the District Court

observed that the " . . . video did show that Fong Lee had a gun." App. 37.

Petitioner's claim that the gun recovered at the scene had been in Minneapolis Police custody before the shooting is contrary to the evidence presented at trial. *See* Petition at 5. The supervisor for the Minneapolis Police Department Property and Evidence Room reviewed records and testified that the gun recovered next to Lee was never in the City's custody prior to the shooting. Transcript pp. 246-247. The jury apparently found the supervisor's testimony credible. Similarly, the District Court concluded that " . . . the evidence overwhelmingly showed that the City never had the gun in its possession until after the Fong Lee shooting." App. 28.

Petitioner's implication that the lack of trace evidence on the recovered gun is inconsistent with Andersen's testimony, was disproven as well. Petition, p. 5. The District Court summarized the testimony about trace evidence well. It stated:

> *For Plaintiff:* There was no trace evidence found on the gun conclusively linking the gun to Fong Lee. *Against Plaintiff*: Forensic scientists testified that trace evidence is often not found on a gun in a situation like this. One individual testified that the fingerprints are found on weapons as little as 12% of the time. Another individual testified that he would have been surprised had a useable print been found on the gun.

App. 36.

II. Procedural history and opinions below

Following a six day trial, the jury rendered a verdict finding that Officer Jason Andersen did not use excessive force against Fong Lee. App. 2. The District Court entered Judgment in favor of Jason Andersen, and denied Petitioner's subsequent motion for a new trial. App. 2; App. 24. The District Court's judgment was affirmed by the Eighth Circuit Court of Appeals on August 12, 2010. App. 1. Judgment by the Eighth Circuit was entered on August 12, 2010, and a Mandate was issued on September 2, 2010. App. 20; App. 23.

REASONS TO DENY THE WRIT

Petitioner has presented no compelling reason to grant the Writ of Certiorari. Sup. Ct. R. 10 states:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; . . . ;

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

None of the enumerated reasons articulated in Sup. Ct. R. 10 apply to this matter. Petitioner's request for review is a request to overturn rulings she disagrees with. She has proffered no compelling reasons to further develop or clarify the controlling precedence on any issue.

I. The petition seeks a reweighing of the evidence, not new Court direction regarding the admissibility of gang membership evidence in civil trials.

Petitioner seeks review of the Eighth Circuit Court of Appeals' finding of harmless error in the introduction of evidence of Lee's gang membership. Petition at 12. This request is contrary to the

direction given in Sup. Ct. R. 10, that the Writ of Certiorari should be granted "only for compelling reasons." Weighing whether an error is harmless or not is not a compelling reason, and not one of the reasons articulated in the rule.

The Rules of Civil Procedure embody the principle that errors in evidentiary rulings should not disturb verdicts in Fed. R. Civ. P. 61.

> [N]o error admitting or excluding evidence . . . is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

Fed. R. Civ. P. 61. "[I]t is well-settled that the appellate courts should act in accordance with the salutary policy embodied in Rule 61." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554, 104 S.Ct. 845, 849 (1984).

The harmless error rule is set forth in 28 U.S.C. § 2111 which states that Courts are to give their judgment "without regard to the errors or defects which do not affect the substantial rights of the parties." "To constitute reversible error, it must be established that the error complained of affected the substantial rights of the objecting party." *Gilliam v. City of Omaha*, 524 F.2d 1013, 1015 (8th Cir. 1975), *citing Palmer v. Hoffman*, 318 U.S. 109, 116, 63 S.Ct.

477 (1943); 28 U.S.C. § 2111; Fed. R. Civ. P. 61. "[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Kotteakos v. U.S.*, 328 U.S. 750, 765, 66 S.Ct. 1239, 1248 (1946).

By its very nature, an inquiry into whether an erroneous evidentiary ruling was harmless is fact specific to the case, and in many circumstances, calls for a thorough evaluation of the entire record. Petitioner argues that harmless error cannot be found because "the trial [was] close." Petition at 12. She then offers the better part of five and one half pages of argument about what the evidence showed at trial. *See generally* Petition, at 12-17 (discussing evidence at trial and case law on admissibility of gang membership). As discussed *supra*, the Petition does not accurately reflect the evidence presented at trial.

Contrary to Petitioner's assertions, the limited use of gang membership evidence was harmless in the light of the body of evidence presented at trial. The evidence overwhelmingly supported Respondent's version of events. Lee's own friends acknowledged that Lee and Xiong came together while riding their bicycles. Transcript pp. 477; 534-535. Xiong gave Lee a gun when they came together. Transcript pp. 346;

391-392. Lee fled the squad car by dropping his bicycle and running away on foot as the car approached. Transcript pp. 63-65; Trial Exhibit 14. The surveillance footage showed Fong Lee holding a gun during the chase. Transcript p. 936 (describing Trial Exhibit 14). The images relied upon by Plaintiff were unclear as to gun possession at best. App. 27. The evidence proved that the gun found next to Fong Lee had never been in police department custody before the date of the shooting, refuting Plaintiff's fanciful theory that the gun was planted by unnamed police officers.

The Eighth Circuit agreed that the evidence in favor of the verdict was strong, ruling:

> When viewed in light of the evidence presented over the course of the six day trial, we conclude that the gang affiliation testimony and defense counsel's limited use thereof during closing argument did not affect Lee's substantial rights or have more than a slight influence on the verdict.

App. 14.

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Petitioner is asking this Court to conduct its own review of the evidence in a case where the evidence strongly favored Respondent. A review of the evidence regarding the "harmlessness" of the error, if any, is not a compelling reason to grant the Writ of Certiorari.

II. The qualified immunity factual predicate question was moot, as the jury did not answer the question.

Any error in the factual predicate question on the Special Verdict Form was mooted by the jury's verdict in favor of Respondent on the question of general liability for excessive force. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287, 120 S.Ct. 1382, 1390 (2000), *quoting County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379 (1979). In such a case, any ruling on the challenged question would be a disfavored advisory opinion. *Alabama v. Shelton*, 535 U.S. 654, 676, 122 S.Ct. 1764, 1777 (2002). Andersen's defense of qualified immunity became moot when the jury ruled in his favor on Question 1, the general question of constitutional liability. *See City of Los Angeles v. Heller*, 475 U.S. 796, 798, 106 S.Ct. 1571, 1572 (1986) (*per curiam*) (affirming District Court's decision to that of a jury decision in favor of officers on the general question of § 1983 liability, mooted any later inquiry into municipal liability or qualified immunity).

In reviewing jury instructions, the Court assumes that "juries act in accordance with the instructions given them, . . . and they do not consider and base their decisions on legal questions with respect to which they are not charged." *Heller*, 476 U.S. at 798, 106 S.Ct. at 1573, *citing Aspen Skiing Co. v. Aspen*

Highlands Skiing Corp., 472 U.S. 585, 604, 105 S.Ct. 2847, 2858 (1985).

The instructions on the special verdict form stated:

> If you answered "Yes" to Question No. 1, then proceed to Question No. 2. If your answer to Question No. 1 is "No," then sign and date this Special Verdict Form without answering any additional questions.

Resp. App. 1.

The jury answered "No" to question No. 1, and followed the instructions to sign and date the Special Verdict Form without answering any further questions. Resp. App. 1. The challenged question regarding the factual predicate to qualified immunity was rendered moot by the jury's answer to Question No. 1. Review of a moot question is not compelling grounds for granting the Writ of Certiorari under Sup. Ct. R. 10.

III. There is no compelling reason to justify granting the Writ of Certiorari to review the lower courts' findings that Petitioner's expert was unqualified to provide expert opinion on the contents of still video images.

Petitioner contends that the District Court and the Court of Appeals erred when they ruled on the admissibility of expert witness Richard Dierks'

opinions on whether Lee had a gun in his hand during the chase. Petition at 30-34. Error, if any, in an evidentiary ruling is not a compelling reason to grant Petitioner's writ. None of the enumerated criteria for granting the writ under Sup. Ct. R. 10 apply. Petitioner has not argued or presented evidence that the rulings on expert admissibility conflict with other courts of appeals. Sup. Ct. R. 10(a). Sup. Ct. R. 10(b) does not apply because this case was tried entirely in federal court. Nor has Petitioner demonstrated that the opinion of the Eighth Circuit Court of Appeals conflicts significantly with the Supreme Court's opinions on the issue. Sup. Ct. R. 10(c). Petitioner does not even identify a potential conflict between the Eighth Circuit ruling and any relevant decisions of this Court.

Decision on the admission of expert testimony under Fed. R. Evid. 702 are reviewed under an abuse of discretion standard. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 1176 (1999). In this matter, the District Court considered Petitioner's expert Richard Dierks' qualifications, and found his testimony on image manipulation admissible, but excluded him from testifying about what he saw in seven manipulated images because "[Dierks] did not . . . employ any specialized knowledge or skill in determining whether he saw a gun in Fong Lee's hand in the video. He simply looked and explained what he saw. The jury was equally capable of doing the same. . . ." App. 33. The Court of Appeals agreed, finding that " . . . the jury was entirely capable of

analyzing the images and determining whether Fong Lee had anything in his hands." App. 11.

When asked at deposition to describe how he came to the conclusion that Lee had no gun in his hand in the seven clarified images, Dierks responded:

> I believe that a reasonable person looking at the clarified photograph and looking at Fong Lee's hand would conclude that his hand does not have a firearm in it.

App. 10.

Deciding whether Dierks was qualified to provide expert testimony regarding the contents of the video still images was squarely within the District Court's discretion. The Petition provides no argument or case law which demonstrates that the District Court's alleged error was so egregious as to be an abuse of discretion. Rather, Petitioner reiterates and expands on the arguments she made to the District Court when it made its decision. *See*, Petition at 31-34. Petitioner is asking this Court to conduct its own review and weigh Dierks' alleged expertise against his admission that he uses the same methods as a reasonable person does in interpreting the contents of photographs. This is the same type of weighing of competing factors that abuse of discretion review is meant to protect. Petitioner has presented no injustice or even the type of error which would justify overturning the lower courts' decisions under an

abuse of discretion analysis. Petitioner fails to offer a compelling reason to obtain Supreme Court review.

CONCLUSION

The Petition for Writ of Certiorari should be denied because no compelling reasons exist to subject the Eighth Circuit Court of Appeals decision to Supreme Court review. Review of the Circuit Court's decision that admission of gang evidence is harmless error is a fact specific inquiry that is not a compelling reason to grant the Writ of Certiorari. Review of the qualified immunity factual predicate question would result in an advisory opinion regarding a moot question. Finally, there is no compelling reason for this Court to review the lower courts' decision on the admissibility of certain elements of Petitioner's expert testimony.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Youa Vang Lee, trustee for the heirs and next-of-kin of Fong Lee, Decedent, Plaintiff, v. Officer Jason Anderson [sic] and the City of Minneapolis; Defendants.	Court File No. 07-1205 (PAM/JSM) **SPECIAL VERDICT FORM** (Filed May 29, 2009)

Members of the Jury:

The following Questions are to be answered by you. Your answer to each Question must be unanimous. In order to answer "Yes" to Question No. 1, you must find that Plaintiff Youa Vang Lee, trustee for the heirs and next-of-kin of Fong Lee, Decedent, has established the claim described in Question No. 1 by the preponderance of the evidence.

1. Do you find by a preponderance of the evidence in favor of Plaintiff Youa Vang Lee, trustee for the heirs and next-of-kin of Fong Lee, Decedent, and against Defendant Officer Jason Andersen on the claim of excessive force?

   Answer: Yes ____ No _X_

   If you answered "Yes" to Question No. 1, then proceed to Question No. 2. If your answer to Question No. 1 is "No," then sign and date this Special

Verdict Form without answering any additional questions.

2. Was Defendant Officer Jason Andersen objectively reasonable in his belief that his use of deadly force was necessary to protect himself or another from apparent death or great bodily harm?

   Answer: Yes ____ No ____

   Please proceed to Question No. 3.

3. What sum of money, if any, will fairly and adequately compensate Youa Vang Lee, trustee for the heirs and next-of-kin of Fong Lee, Decedent, for her damages?

   $_____

   Please proceed to Question No. 4.

4. Do you find that Defendant Officer Jason Andersen was malicious or recklessly indifferent to Fong Lee's constitutional right to be free from the use of excessive force?

   Answer: Yes ____ No ____

   If your answer to Question No. 4 is "Yes," please proceed to Question No. 5. If your answer to Question No. 4 is "No," then sign and date this Special Verdict Form without answering any additional questions.

5. Defendant Officer Jason Andersen is assessed punitive damages in the amount of $_____ (if none, write the word "none").

Dated: 5/28/09

_____

28 U.S.C. § 2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

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28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Fed. R. Civ. P. 61. Harmless Error

Unless justice requires otherwise, no error in admitting or excluding evidence – or any other error by the court or a party – is ground for granting a new trial, for setting aside a verdict, or for vacating,

modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.